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SUPREME COURT, U.S.

IN THE SUPREME COURT

OF THE UNITED STATES

(OCTOBER 1976 TERM)

GEORGE STREET,
PETITIONER

VS.

THE STATE OF GEORGIA,
RESPONDENT

MISC. NO. 76-5537

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

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PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

George Street, by counsel, respectfully petitions this Court on the following basis for a writ of certiorari to review the judgment of the Supreme Court of Georgia in Street v. State, 237 Ga. 307, __ S.E.2d __ , entered on 9 July 1976 (rehearing denied 22 July 1976). A copy of the opinion and judgment in that case, affirming his conviction for murder and his sentence to death, is attached as Appendix 1-18. A copy of the order denying the motion for a rehearing is attached as Appendix 19.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1257(3) to issue the writ because the subjects of the Petitioner's claims in the State proceedings were (1) his right under the Sixth and 14th Amendments of the Constitution not to be sentenced to death by a jury drawn from panels from whom were excluded for cause those who harbored only general reservations about the death penalty and (2) his right under the 14th Amendment not to be deprived of his life except upon due process of law.

As the proceedings below were criminal, this petition is timely under Rule 22(1) of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Whether, having determined on the basis of an incomplete record of the voir dire that "one juror was probably improperly excused" for her scruples against capital punishment (App. 6), the State Supreme Court could, consistently with Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1968), and Maxwell v. Bishop, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970), permit the Petitioner's sentence to death to stand.

2. Whether, to the extent that the transcript of the voir dire was so incomplete (in violation of the mandates of State law) that the State Supreme Court was "unable to determine if the examination was adequate under Witherspoon v. Illinois" (App. 6), the Petitioner was denied due process of law on the mandatory and plenary review of his death sentence under State law (Georgia Code Annotated 27-2537 [Georgia Laws 1973, pp. 159, 165) so that the extreme penalty cannot be enforced.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ."

The 14th Amendment: "[N]or shall any State deprive any person of life . . . without due process of law . . . ."

Georgia Code Annotated 6-805(a) [Georgia Laws 1965, pp. 14, 24]: "In all felony cases, the transcript of evidence and proceedings shall be reported as provided in Code section 27-2401, or as may hereafter be provided by law."

Georgia Code Annotated 6-805(d): "Where a trial in any . . . criminal case is reported by a court reporter, all motions, colloquies, objections, rulings, all evidence, . . . the charge of the court, and all other proceedings which may be called in question on appeal or other post-trial procedure shall be reported . . . ."

Georgia Code Annotated 27-2401 [Georgia Laws 1973, pp. 159, 169]: "On the trial of all felonies the presiding judge shall have the testimony taken down, and, when directed by the judge, the court reporter shall exactly and truly record . . . the testimony and proceedings in the case, except the argument of counsel . . . ."

Georgia Code Annotated 26-1101(c) [Georgia Laws 1968, pp. 1249, 1276]: "A person convicted of murder shall be punished by death or by imprisonment for life."

Georgia Code Annotated 26-3102 [Georgia Laws 1973, pp. 159, 170]: "Where, upon trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be

imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death . . . ."

Georgia Code Annotated 27-2537 (Georgia Laws 1973, pp. 159, 165]:

"(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court . . . shall transmit the entire record and transcript to the Supreme Court of Georgia . . . .

"(b) With regard to the sentence, the court shall determine"

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. * * * *

"(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

STATEMENT OF THE CASE

On 14 October 1974, the Petitioner took his wife to the Pierce County, Georgia, Hospital for the delivery of their first child. There he was advised that his wife and expected child would not be admitted beyond the emergency room until proper arrangements were made to cover their hospital expenses. (App. 1)

The Petitioner left and hailed one of the two local taxi cabs, driven (for the past 30 years) by a popular local figure (who had also driven one of the local school buses for the past 15 years) (Trial Transcript, p. 40). -1)

-1) Pierce County had a 1970 population of about 9200 (Transcript of motion for a change of venue, p. 5).

After unsuccessfully seeking financial assistance from members of his family throughout the county, the Petitioner directed the cab to a deserted home. There an altercation allegedly broke out about his payment of the mounting cab fare. According to the Petitioner's confession, the cab driver advanced toward him with a blackjack and he pulled his knife and slashed him repeatedly and fatally in self-defense. The victim's body ended up in a well where it was discovered that evening as a result of an investigation launched when the blood-stained cab was found abandoned near the hospital. (App. 2-3)

The Petitioner was identified as the last passenger and he was arrested on the following day. He signed consent-to-search forms which led to the discovery of various incriminating items in his room, including a knife stained with human blood and some personal property which had belonged to the victim.-2) He also confessed to the homocide but maintained that he acted in self-defense. (App. 2-3)

The grand jury indicted the Petitioner for murder and armed robbery, and the State filed notice that it would seek the death penalty pursuant to Georgia Code Annotated 27-2434.1 (b)(1) and (b)(7). (App. 1, 11-12)

A motion by appointed counsel for a change of venue on grounds of pervasive and prejudicial pre-trial publicity was overruled (App. 3-5) and a jury was selected. It found him guilty of both charges and sentenced him to death for the murder and to life imprisonment for the robbery. With one Justice dissenting on State constitutional grounds, the Georgia Supreme Court affirmed both the conviction and sentence on the mandatory appeal, Street v. State, 237 Ga. 307, ___ S.E.2d ___ (9 July 1976) (App. 1-18).

Although it was relevant to the change of venue issue (see App. 3, 5) and critical to the jury selection issue presented in this petition, the jury voir dire was not recorded as required by State law, Georgia Code Annotated 6-805(d).

-2) The Petitioner had paid some $29.00 on his family's hospital bill around noon on the 14th (App. 1).

The jury panel was qualified for scruples toward capital punishment and the one juror who expressed some reservations was excused for cause. Frome the scant record before it (the jury list with the clerk's notations [App. 11]), the State Supreme Court determined that she "was probably improperly excused" on that account (App. 6), though elsewhere it indicated that because of the lack of a transcript it was "unable to determine if the examination was adequate under Witherspoon v. Illinois [infra]" (App. 6). In sustaining nonetheless the death penalty, however, it relied upon Davis v. State, 236 Ga. 804, 225 S.E.2d 241 (1976). It held that the improper excusal of one juror for his scruples against capital punishment did not require that a death penalty be set aside since it could not be said that the jury had been "organized to return a verdict of death" (App. 6). Accordingly, it concluded that it was not necessary to pass upon the efforts of the State and the trial court to reconstruct the voir dire record as to the particular juror under Georgia Code Annotated 6-805(f). -3) (App. 6)

REASONS FOR ISSUING THE WRIT

I. THE JUDGMENT BELOW IS PROBABLY NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

In Witherspoon v. Illinois, 391 U.S. 510, 89 S.Ct. 1770, 20 L.Ed.2d 776 (1968), this Court flatly held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," 391 U.S. at 522. See also Boulden v.

-3) In Owens v. State, 233 Ga. 869 at 872-3, 214 S.E.2d 173 (1975), the Georgia Supreme Court held: "A post-trial examination of lawyers and court officials, or of excluded veniremen, would not be a satisfactory means for this court to perform its review functions." It concluded flatly "that failure to record the Witherspoon voir dire in a case where the sentence is death is reversible error."

Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969), Maxwell v. Bishop, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970).

Having concluded on the scant record before it that the single venireman who represented that portion of the community with reservations as to capital punishment was "probably improperly excused" (App. 6), the Georgia Supreme Court was powerless to avoid the mandate of Witherspoon. It sought to do so, however, by applying its own holding in Davis v. State, supra, -4) that "The rationale of Witherspoon and its progeny is not violated where merely one of a qualified class or group is excluded and where it is shown . . . that others of such group were qualified to serve," 236 Ga. at 809. -5)

Essentially, the Georgia Supreme Court has approved a harmless error inquiry in the face of any Witherspoon violation. This Court, however, has never countenanced any such inquiry. Indeed, in Funicello v. New Jersey, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed.2d 859 (1971), this Court implicitly eschewed any such test. The record in that case, State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1970), evidently reflected that a proper standard had been applied with only two possible exceptions (though as in the case below the voir dire transcript was incomplete), 245 A.2d at 195-96. Nonetheless, this Court summarily reversed the death sentence without comment.

No harmless error test is appropriate for any Witherspoon violation which could have disturbed in a death case the critial "link between contemporary community values and the penal system . . . without which the determination of punishment could hardly reflect 'the evolving

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-4) An application for a writ of certiorari to review Davis v. State was filed in this Court around 18 September 1976.

-5) Actually, the Georgia Supreme Court watered down Davis to hold that it controlled the case below, for in the record of this case there was no indication that any other scrupled veniremen were on the panel and were qualified to serve.

standards of decency that mark the progress of a maturing society,'" Gregg v. Georgia, ___ U.S. ___ at ___, 96 S.Ct. 2909 at 2933, ___ L.Ed.2d ___ (1976) (quoting Witherspoon, supra at 519n., and Trop v. Dulles, 356 U.S. 86 at 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). No such test is appropriate both where the consequences to the accused are so grave and where even greater than usual reliance falls upon the jury to act as a buffer to possibly overzealous prosecution, cf. Wood v. Georgia, 370 U.S. 375 at 390, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962).

Indeed, even where only a single venireman is involved, no harmless error test is reasonably viable for, as Justice Ingram (joined by Chief Justice Nichols) wrote in dissent in Davis v. State, supra 812 at 814:

> The error would not be harmless because nobody knows (. . . not even the majority of this Court) whether the State would have exercised one of its statutory strikes to excuse this juror if she had not been excused for cause by the trial judge. If she had not been excused but rather had served on the trial jury, who can say, without boasting of clairvoyance, that she would not have influenced her fellow jurors to impose a sentence other than death?

II. THE JUDGMENT BELOW IS IN DIRECT CONFLICT WITH DECISIONS BY THE LOCAL FEDERAL CIRCUIT COURT OF APPEALS.

There is an unresolved conflict among the jurisdictions which have considered the question of whether the improper exclusion of a single or a comparative few scrupled veniremen should bar the execution of a death sentence. In accord with Georgia holding that such an exclusion does not result in an unfairly stacked jury where other scrupled veniremen were admitted to the panel are, e.g., Bell v. Patterson, 402 F.2d 394 (10th Cir. 1968), Hawkins v. Wainwright, 245

So. 2d 287 (Fla. 1971), State v. Monk, 212 S.E.2d 125 (N.C. 1975), Pittman v. State, 434 S.W.2d 352 (Tex.Ct.Cr.App. 1968). Other jurisdictions, among them the Fifth Circuit Court of Appeals which embraces Georgia, have reached exactly the opposite conclusion: e.g., Marion v. Beto, 434 F.2d 29 (5th Cir. 1970), cert. den. 402 U.S. 906 (1971), Woodards v. Cardwell, 430 F.2d 978 (6th Cir. 1970), Liddell v. State, 251 So. 2d 601 (Ala. 1971), People v. Schader, 457 P.2d 841 (Calif. 1969).

Comity considerations weigh in favor of this Court finally resolving the conflict between the Supreme Court of Georgia in Davis v. State, supra, and the case below and the Fifth Circuit in Marion v. Beto, supra, and Hackathorn v. Decker, 438 F.2d 1363 (1971).

III. THE JUDGMENT BELOW INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION WHICH THIS COURT HAS NOT HERETOFORE ENTERTAINED: WHETHER THE UNLAWFUL ABSENCE OF A COMPLETE VOIR DIRE TRANSCRIPT, CRITIAL TO A FULL AND EFFECTIVE REVIEW OF SPECIFIC ISSUES RAISED ON AN APPEAL IN A DEATH CASE WHICH IS MANDATORY UNDER STATE LAW, CONSTITUTES A DENIAL OF APPELLATE DUE PROCESS OF LAW SECURED BY THE 14TH AMENDMENT.

Georgia law provides for a broad and mandatory appellate review of both the conviction and sentence in any death case, Georgia Code Annotated 27-2537. See Gregg v. Georgia, supra. It specifically requires that the State Supreme Court "shall consider the punishment as well as any errors enumerated by way of appeal." It must specifically find that the sentence was not imposed under the influence of passion or prejudice.

Other State statutes also require that "all . . . proceedings which may be called into question on appeal or other post-trial procedures . . . be reported," Georgia Code Annotated 6-805(d), and this statute clearly embraces any voir dire of the jury to determine its qualifications under Witherspoon v. Illinois, supra. The State Supreme Court, moreover, has conceded that it generally cannot satisfactorily perform its broad and mandatory review functions as to Witherspoon issues without a full voir dire transcript, Owens v. State, supra, Tamplin v. State, 235 Ga. 774, 221 S.E.2d 455 (1975).

In cases such as the one below, where the State Supreme Court attempted to adjudicate the Witherspoon issue on a plainly inadequate record, the denial of the Petitioner's right to appellate due process is clear, particularly insofar as it also implicates the ability of counsel to assist him effectively. Cf. Hardy v. United States, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964).

However, the process of law due the Petitioner under Georgia's death review provisions was also frustrated below in other respects besides the Witherspoon issue.

In any death case, whether the jury imposed the sentence under the influence of prejudice or passion is material, but the Petitioner also raised a particular and substantial issue concerning pervasive and allegedly prejudicial pre-trial publicity in the small community where the homocide occurred. In his brief, he insisted that "although it is not reflected in the record, numerous jurors indicated on voir dire that they were acquainted with the facts of the case either through having read about it in the newspapers or some other means" (App. 3).

The absence (contrary to State law) of the voir dire transcript completely prevented the State Supreme Court from realistically discharging its responsibilities with respect to these two matters also. After revieving the authorities on the publicity point, for example, it "conclude[d] that under the decisions of the Supreme Court of the United States, to find that the petitioner did not receive a fair trial, petitioner must show . . . (2) that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible.

"The Appellant Street has shown neither" (App. 5).

Without the full record to which he was entitled, he could hardly have shown actual community prejudice reflected in the jury or any basis of prejudice and passion which could have tainted the sentence. Without a full record, his attorney could not have effectively assisted him.

The record below is an appropriate vehicle on which this Court could reach the constitutional issues it deferred in Hardy v. United States, supra.

CONCLUSION

This Court should issue a writ of certiorari to the Supreme Court of Georgia and vacate its judgment sustaining the Petitioner's death sentence.

Respectfully,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

I.

STATEMENT OF THE CASE

George Street, Petitioner herein, was indicted on November 8, 1974, by the grand jury of Pierce County for the offenses of murder and armed robbery. (R. 1-5). Tried before a jury, Petitioner was found guilty of murder and armed robbery and sentenced to death for the offense of murder. (R. 5, 24-26). The jury found beyond a reasonable doubt that the offense of murder was committed while Petitioner was engaged in the commission of the offense of armed robbery, and that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. (R. 12). Following denial of Petitioner's motion for new trial as amended on June 25, 1975, a notice of appeal was filed on July 23, 1975. (R. 67). The conviction and sentence was affirmed by the Georgia Supreme Court. Street v. State, 237 Ga. 307 (1976).

On October 14, 1974, Petitioner George Street and Ruby Taylor, his common-law wife, resided in the home of Billy and Lucy Mae Ingram. (T. 196, 353, 372). Early that morning Ruby Taylor went into labor and was taken to Pierce County Hospital for delivery. (T. 3, 75-76).

The hospital policy required that before a patient could be transferred from the emergency room (treatment room) into the hospital, proper arrangements had to be made to cover the hospital expenses. (T. 7). Betty Pearson, a hospital employee, saw Petitioner at approximately 6:30 a.m. and again at 9:00 - 9:30 a.m. on October 14, 1974, and explained this policy and procedure to him. (T. 3, 4). Several other hospital employees also saw Petitioner at the hospital during the morning hours. (T. 11, 24, 56).

The murder victim, Mr. M. B. "Red" Herrin, drove a school bus and operated a taxi service. (T. 38). His wife worked at Pierce County Hospital. (T. 37). Mr. Herrin would leave home at approximately 7:00 a.m. to drive the school bus and return at approximately 8:30 a.m. to pick up his taxi. He would then operate the taxi service until approximately 2:00 p.m. when he would again drive the school bus to return the children home. (T. 39, 40).

Mr. Herrin carried a pistol and a blackjack in his taxi for protection. (T. 41). He also carried enough money to change small bills. (T. 42). In the taxi there was also a small plywood box used to deposit tax receipts from fares collected from passengers. (T. 42, 43). Also in the taxi were insurance papers, tag receipts, etc. (T. 44). On the day of his death, Mr. Herrin was also wearing his wedding band, masonic ring and wristwatch. (T. 43).

Mrs. Herrin had given her husband a check to cash, in the approximate amount of $50.00, from her former employer. At approximately 10:00 a.m. Mr. Herrin arrived at the hospital and gave his wife $20.00 from the proceeds of the check. (T. 37).

At approximately 11:00 a.m., October 14, 1974, Mr. Dean Broome, who operated a printing office and supply store across the street from Mr. Herrin's taxi office, saw Mr. Herrin parked and awaiting a fare. (T. 58, 59). As Mr. Broome left his store, he saw a black man, of Petitioner's size and facial features, probably wearing a hat, enter the taxi. (T. 59, 60). Mr. Broome saw the passenger a second time when the taxi driven by Mr. Herrin subsequently passed him. (T. 60).

Sammy Taylor, Ruby Taylor's brother, saw Petitioner arrive at his home on October 14, 1974, in a taxi. He also saw Petitioner leave in a taxi. (T. 95, 96).

Mrs. Elmo Strickland worked for Dr. Catherine Hendry. (T. 102). She first noticed Mr. Herrin's unattended cab parked adjacent to Dr. Hendry's office at approximately 12:30 p.m., just before she left for lunch. (T. 102, 103). The cab was still in the same location at 3:30 p.m. and was there at 4:55 p.m. when she left worked. (T. 104).

At approximately 2 -2:30 p.m., Petitioner was again seen at Pierce County Hospital. (T. 11, 26, 56). On that occasion Petitioner was noticed to have a bandage wrapped around two fingers of his left hand. (T. 14). Street also paid $29.00 on the hospital bill of Ruby Taylor. (T. 27).

When Mr. Herrin failed to show up to drive the afternoon school bus, Mr. Byron Dale Thomas contacted Mr. Roberts to drive the bus. (T. 106, 107). After Mr. Thomas and Mr. Roberts returned from their bus routes, Mr. Thomas decided to ride around town and look for Mr. Herrin's cab. (T. 108). He discovered the abandoned taxi at approximately 5:00 p.m., adjacent to Dr. Hendry's office. (T. 109). Mrs. Herrin pursuant to a telephone call from Mrs. Mamie Smith received at approximately 4:45 p.m., called her daughter-in-law and requested that her son be informed that his father's car had been found abandoned.

Mr. Thomas, Mr. Roberts and Milton Allen Herrin, the victim's son, returned to the abandoned taxi. (T. 110). They observed blood in the front seat, on the steering wheel and on the head rest. (T. 11, 112). They then drove to the police station and notified the authorities. (T. 112).

Subsequently, the investigation led to an abandoned house in the Walkerville Community. (T. 184). George Street had once lived in the abandoned house, now the murder scene. (T. 410). At the murder scene a trail of blood led from the front yard, through the house into the backyard to an abandoned well. (T. 188, 190). The well curving showed signs of blood, but the water was dark and stained preventing a visual determination of the depth of the well. (T. 344, 411). The well was full of water, to within 18-20 inches of ground level. (T. 187-411). The depth of the water was approximately 10-10 1/2 feet. (T. 345).

Police Chief Daniel Taylor probed the well with a pike pole to no avail. Thereafter, Chief Taylor, secured by a rope, was lowered into the water. He probed the water with the pike

pole until it hooked into the right shoe of the victim, who was in the well head first, and lifted the body of Mr. Herrin from the well. (T. 344).

Petitioner was confronted at the home of Billy Ingram where he was advised of his constitutional rights. (T. 195, 416). Pursuant to consent given by Billy Ingram, the following items were recovered primarily from the bedroom occupied by Petitioner and Ruby Taylor: a hawk bill knife, a black billfold, two brown paper bags containing a hat with the word Budweiser on it, one white pullover shirt, a blackjack and a man's shirt and trousers. (T. 201). In the living room officers found a Caravelle wristwatch. (T. 202). Petitioner admitted that he owned the hawk bill knife, State's Exhibit 6. (T. 213). Lucy Mae and Billy Ingram testified that on October 14, George Street was wearing the watch which they had never seen him wear before. (T. 353, 372). The watch and blackjack were identified as belonging to Mr. Herrin. (T. 397).

Petitioner was advised of his constitutional rights on October 15, 1974, and on October 17, 1974. (T. 211). Thereafter, on October 17, 1974, Petitioner made a statement in the presence of District Attorney Dewey Hayes, Sheriff Noah Strickland and investigator Charles Bryant. (T. 447). Sheriff Strickland testified concerning Petitioner's statement and thereafter a tape recording of the statement was played for the jury. (T. 447).

On the tape recording, Street acknowledged that his statement was being recorded and acknowledged that he had been advised of his constitutional rights. (T. 447, 448). His statement, in summary, was as follows:

After leaving the hospital, and before lunch, Street contacted Mr. Herrin to drive him to his mother-in-law's home. When they arrived at her home, Street stayed for a few minutes before returning to the taxi. Mr. Herrin then drove him back into town where Street attempted to telephone his mother, who did not answer the phone. Street then had Mr. Herrin return him to his mother-in-law's home, and thereafter drive him back into town where he again tried unsuccessfully to call his mother. At that point, Mr. Herrin informed Street that his fare was now $38.00. Street knew he had only $20.00 so instructed Mr. Herrin to drive him to his brother-in-law's where he would get the money. Street directed Mr. Herrin to the abandoned house under the pretense that his brother-in-law resided there. When they arrived at the house Petitioner went inside, returned and told Mr. Herrin that his brother-in-law had apparently moved. Mr. Herrin then informed Street that he must pay the fare or he would take him to the sheriff. Petitioner stated that he was not going to the sheriff's office, at which time Mr. Herrin got out of the taxi and they started tussling. Street drew his hawk bill knife and slashed Mr. Herrin. He then ran into the house followed by Mr. Herrin, who exited the house and went over near the well and as he turned, George Street pushed him head first into the well. Street then ran to the taxi and drove it back into Blackshear where he abandoned it. (T. 447-457).

The autopsy revealed that Mr. Herrin suffered 14 knife wounds. (T. 480). The cause of death was multiple deep knife wounds and drowning, the latter possibly being the terminal event. (T. 482).

PART II

REASONS FOR NOT GRANTING THE WRIT

A. THE RECORD REFLECTS THAT ONLY ONE JUROR WAS IMPROPERLY EXCUSED FOR CAUSE; THE APPARENTLY ERRONEOUS EXCLUSION OF ONE JUROR BECAUSE OF THE JUROR'S CONSCIENTIOUS OPPOSITION TO CAPITAL PUNISHMENT DOES NOT DEMAND THE CONCLUSION THAT THE JURY WAS BIASED IN FAVOR OF CAPITAL PUNISHMENT.

On direct appeal to the Georgia Supreme Court, Petitioner urged that the trial court erred in overruling his objection to the qualification of prospective jurors regarding capital punishment and erred in correcting the transcript relative to the voir dire examination of jurors.

The Georgia Supreme Court noted that attached to the record on appeal was the hearing on the motion for a new trial and motion to correct the transcript. On the hearing, testimony was heard regarding the voir dire examination of prospective jurors on the issue of conscientious scruples against capital punishment. Street v. State, 237 Ga. 307, 312 (1976). The court also noted that the jury list used in selecting the jury indicated those jurors excused by the court, the State or by the defense and had been attached to the trial court's order without objection. Street, supra, at 312. The Georgia Supreme Court thus concluded that one juror had probably been improperly excused.

The bottom line issue is whether the jury which tried the Petitioner, less a juror improperly excluded, was thus "organized to return a verdict of death"; was "a hanging jury"; or that the State had "stacked the deck against Petitioner". Witherspoon v. Illinois, 391 U.S. 510, 521-523 (1968). The improper exclusion of one juror does not automatically categorize the jury which tried the Petitioner nor deprive Petitioner of an impartial jury.

In Witherspoon, supra, 47 jurors who did not believe in the death penalty or who had conscientious or religious beliefs against it were excluded. Likewise, in Boulden v. Holman, 394 U.S. 478 (1968), 15 jurors had been summarily excused because of their conscientious or religious opposition to capital punishment. The basis of Witherspoon was that there had been a systematic exlcusion of all who opposed capital punishment, and by virtue of such a substantial element of society being eliminated, the jury failed to reflect a cross section of the community. Bell v. Patterson, 402 F.2d 394, 398-99 (10th Cir. 1968) cert. den. 403 U.S. 955 (1971); but see Marion v. Beto, 434 F.2d 29 (5th Cir. 1970) cert. den. 402 U.S. 906 (1971).

Thus, the record will not support the conclusion that the jury which tried the petitioner, less one juror improperly excused was biased in favor of capital punishment to the extent that Petitioner was denied due process of law.

B. THE RECORD BEFORE THE GEORGIA SUPREME COURT PROVIDED SUFFICIENT BASIS FOR THE COURT'S MANDATORY REVIEW OF PETITIONER'S SENTENCE OF DEATH AND DID NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW.

Petitioner contends that the mandatory review of his death sentence violated his constitutional right to appellate due process of law because the voir dire was unreported. Particularly, he asserts a denial of due process because the unreported voir dire hindered his attorney in providing effective assistance and for the reason that the Georgia Supreme Court could not adequately determine that the sentence of death had not been imposed under the influence of passion or prejudice inasmuch as Petitioner had raised the issue of prejudicial pretrial publicity.

The Georgia Supreme Court is required to determine: (1) "Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor"; (2) whether the evidence supports the aggravating circumstances; and (3) whether the sentence is excessive or disproportionate to the sentence imposed in similar cases. Ga. Code Ann. § 27-2537 (Supp. 1976). In this regard, not only does the court consider the trial transcript and record, but also a separate report filed by the trial judge. See Gregg v. Georgia, No. 74-6257 (United States Supreme Court, decided July 2, 1976). As previously stated, the Georgia Supreme Court had before it the Clerk's jury list showing those jurors

struck and the reason therefore. Also, the court had the record and trial transcript available for review. Thus, while the complete voir dire was unreported, there was sufficient basis for the court's determination.

In his brief, Petitioner asserts that on direct appeal he stated that several jurors indicated on voir dire that they were acquainted with the facts of the case. (Petitioner's brief, p. 10). The Georgia Supreme Court stated that the basis of the motion for change of venue was extensive adverse pretrial publicity and danger of violence to Petitioner. Street, supra at 308. "We note there was no violence toward the Appellant during the trial." Street, supra at 308. The court also noted that the motion was based upon news articles (seven articles). Street, supra at 309. Also, on the hearing of the motion for a change of venue, numerous witnesses testified that they believed Petitioner would receive a fair trial in the county. Id. Particularly, the court noted that the basis of the alleged error was the allegation that a juror expressed a fixed opinion as to Petitioner's guilt. However, "We note that the juror . . . was not considered until after 12 jurors and the first alternate had been selected. She was then excused by the defense. There is no indication of how this would have prejudiced the Appellant." Id.

Even assuming that some jurors were acquainted with the facts of the case, that alone is insufficient to demand a finding that an impartial jury could not be impaneled. "[P]retrial publicity - even pervasive, adverse publicity - does not inevitably lead to

an unfair trial." Nebraska Press Association v. Stuart, __ U.S. __, 49 L.Ed.2d 683, 96 S. Ct. 2791 (1976). "The decided cases 'cannot be made to stand for the proposition that juror exposure to information about a State defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process'." Nebraska Press Association, supra; citing Murphy v. Florida, 421 U.S. 794 (1975). Assuming that certain jurors were in fact acquainted with the facts of the case, there is no evidence nor allegations that the "trial atmosphere . . . had been utterly corrupted by press coverage". Murphy v. Florida, supra at 798. Likewise, there is no requirement that jurors "be totally ignorant of the facts and issues involved." Id. at 800. In view of the issues and evidence before the court, the mandatory review of Petitioner's sentence of death did not constitute a denial of due process of law.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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